No. 11,491

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ALLEN ZIEGLER, RAYMOND ZIEGLER and WEST COAST SUPPLY CO. (a partnership),
Appellants,

vs.

PHILIP B. FLEMING, Temporary Controls Administrator,
Appellee.

Appeal from the District Court of the United States for the Southern District of California, Central Division.

BRIEF FOR APPELLEE.

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JURISDICTION.

This is an appeal from a judgment for preliminary injunction issued by the United States District Court for the Southern District of California, pursuant to Section 2(a)(6) of Title III of the Second War Powers Act, as amended (56 Stat. 176, 50 U.S.C. App. Secs. 631-645(a)). Jurisdiction of this Court is invoked under Section 129 of the Judicial Code. (28 U.S.C. Sec. 227.)

ARGUMENT.

I.

SUGAR RATIONING CONTINUES TO BE A VALID EXERCISE OF THE WAR POWERS OF CONGRESS.

Appellants attack the constitutional validity of sugar rationing on the ground that "changed conditions of the war status of the United States as of July 1, 1946 and thereafter," and the "changed conditions in the war economy of the United States following the surrender of the enemies," cut off the "reasonable relationship between the war powers and sugar rationing on which Third Revised Ration Order #3 was based". (App. Br., p. 18.) This contention is supported only by their statement that "as of July 1, 1946, and thereafter, * * * It is a matter of common knowledge that the need for food commodities such as sugar was only a fractional part of the requirements for such commodity during the fighting part of the war and the immediate months following the surrender of our enemies". (App. Br., p. 17.)

Appellants admit that before the capitulation of our enemies, rationing *per se* was a valid exercise of the war power of Congress. They do not deny that the war emergency continues, *Porter v. Shibe,* 158 F. (2d) 68 (C.C.A. 10, 1946); *Porter v. Granite State Packing Co.,* 155 F. (2d) 786 (C.C.A. 1, 1946); *Bowles v. Barde Steel Co.,* 164 P. (2d) 692 (Ore., 1945); *Bowles v. Soverinsky,* 65 F. Supp. 808 (D.C. E.D., Mich., 1946); *Bowles v. Ormesher Bros.,* 65 F. Supp. 791 (D. Neb., 1946); *Bowles v. Lee,* 4 OPA Opinions & Decisions 2095 (S.D. Ill., N.D., not of-

ficially reported); nor do they take open issue with the well-established principle that the war powers of Congress extend beyond the period of active warfare and terminate only with the ratification of a treaty or a proclamation of peace. *Hamilton v. Kentucky Distilleries & Warehouse Co.,* 251 U. S. 146, 40 S. Ct. 106; *Hijo v. United States,* 194 U.S. 315, 24 S. Ct. 727; *The Protector,* 12 Wall. 700; *Stewart v. Kahn,* 11 Wall. 493; *United States v. Anderson,* 9 Wall. 56.

Their argument appears to be based, however, on the reasoning that with the cessation of hostilities, Congress' power to ration food was transferred out of the class of war powers justified by the mere existence of a legal state of war and placed in the category of those that must be dependent on the existence of a necessity arising out of the war or incident thereto.

In answer, it is submitted that even if it were assumed that the power to ration sugar must now be justified by the existence of such a necessity incident to the war, its exercise is nevertheless still valid, for "* * * the war power is not limited to victories in the field and the dispersion of the insurgent forces. It carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress * * *." *Stewart v. Kahn, supra.*

The cessation of hostilities brought to a close but one phase of the war. The period of reconstruction had just begun. Of that Congress was well aware when

it reenacted the Second War Powers Act[1] in December, 1945,[2] four months after the surrender of Japan. Report No. 1282 (to accompany H.R. 4780, 79th Cong., 1st Sess., Nov. 26, 1945) explained:

> "* * * the Axis Powers have been brought to unconditional surrender, yet neither the war nor the peace has been won. Our victory then is neither final nor complete. We still have before us and our allies years of service in foreign lands, requiring the solution of problems at least as difficult as were those of war." (p. 1.)

The importance of food in winning the peace was emphasized by Congress in these words:

> "The conflagration that so recently blanketed the globe, still flares in spots. We have learned that no place is too remote to be a menace. * * * *Military and naval might, * * * do not quench the fire of war so potently as the milk of human kindness. No civilized nation, much less one that is Christian, can allow even surrendered enemies to starve or freeze when we have enough and to spare. That would not even be good business, were we so base as to be governed by no higher motive.* Even more incumbent on us is it to share with our allies in the liberated countries; and, of course, we must not fail to provide adequately for our own forces of occupation. This job cannot be done until the last man or woman so engaged shall have been brought safely home and be happily rehabilitated into our peacetime economy." (p. 2.) (Emphasis added.)

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[1]56 Stat. 176, 50 U.S.C. App., Secs. 631-645(a).
[2]Public Law 270, 79th Cong., 1st. Sess.

Only by continued rationing of our critical supplies would we have been able to allocate food to those in need during this period. How strongly the world food shortage motivated Congress to extend the Second War Powers Act again in June, 1946,[3] is apparent in its reports. Senate Report No. 1414, dated June 4, 1946 (79th Cong., 2d Sess., to accompany H.R. 5716) stated:

> "A complete hearing on this bill was held on May 31 * * *." (p. 1.)
>
> "All of the testimony clearly supported assertions of the need for continuation of the seven titles with which this bill deals. Stress was laid on the fact that in addition to other reasons for continuing the authority granted by these titles, *several new factors have arisen which are also impelling reasons for such continuance, including the present tragic food shortage throughout the world,* the housing situation in the United States, and unsettled labor and industrial conditions recently arisen and now threatened." (p. 2.) (Emphasis added.)

House Report No. 1714, dated March 14, 1946 (79th Cong., 2d Sess., to accompany H.R. 5716) referring to its Report No. 1282 of November 26, 1945, *supra,* said:

> "These same impelling reasons * * * will serve the same purposes as were then apparent, with three exceptions: (1) *the world food shortage* * * * [*has*] *become more apparent* * * *." (p. 1.) (Emphasis added.)

[3]Public Law 475, 79th Cong., 2d Sess.

On March 31, 1947, Congress again extended Title III of the Second War Powers Act by the Sugar Control Extension Act of 1947. Both Senate and House Reports[4] dwelled at length on the necessity for continued sugar control. Concerning the shortage of sugar, H.R. 150 stated:

> "Devastation during the war in important sugar-producing areas has resulted in a short world supply of sugar. The low point in sugar production was reached in 1945-1946 with a world production of 26,692,000 tons which amounted to only 77 percent of the pre-war 1935-1939 average production of 34,660,000 tons. [Short tons, raw value] Estimated production in 1946-47 showed an important recovery to 30,361,000 tons or 88 percent of the prewar average."

After discussing past production, current demands, allocations and supplies, also future prospects of sugar production, the report concluded:

> "The committee feels that it would be unwise at this time to terminate the authority to exercise rationing and price control over sugar. It feels that if such controls were terminated at this time, it might result in excessive price increases and the further probability that the housewife would be at a disadvantage of having to bid against the industrial user for the available short supply. Therefore, it recommends that the authority be continued to October 31, 1947, with

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[4]H.R. 150 to accompany H.J.Res. 146, dated Mar. 15, 1947, 80th Cong., 1st Sess., S.R. 50 to accompany S.J.Res. 58, dated Mar. 12, 1947, 80th Cong., 1st Sess.

> the right to exercise inventory controls until March 31, 1948 * * *."

Such Congressional determinations of the necessity for legislation, must be given great weight. When a similar argument as is here tendered was urged in *Hamilton v. Kentucky Distilleries & Warehouse Co., supra* —that in October, 1919 there was no longer any necessity for the prohibition of the sale of distilled spirits for beverage purposes, under the War-Time Prohibition Act—the Supreme Court said:

> "* * * on obvious grounds every reasonable intendment must be made in favor of its continuing validity, the prescribed period of limitation not having arrived; that to Congress in the exercise of its powers, not least the war power, upon which the very life of the nation depends, a wide latitude of discretion must be accorded; and that it would require a clear case to justify a court in declaring that such an act, passed for such a purpose, had ceased to have force because the power of Congress no longer continued."

Obviously, appellants here do not present such a "clear case" to offset the Congressional determination of the notorious fact that there is a world shortage of food, particularly sugar; that in order to meet its commitments to our allies and the peoples in the occupied and liberated countries, and to protect the domestic consumer from the economic confusion which would result from uncontrolled competition; Congress must exercise its war power to effectively allocate the short supplies of sugar.

II.

A. THE FACTS WHICH INDUCED THE PRESIDENT TO EXERCISE THE POWER TO RATION WERE NOT REQUIRED TO BE PROVED BELOW.

B. THE WORDS "DEFENSE OF THE UNITED STATES" AS USED IN SECTION 2(a)(2) OF THE SECOND WAR POWERS ACT DO NOT REFER ONLY TO DEFENSE AGAINST THE ENEMY.

Objection is made by the appellants that no facts were present before the District Court to show that as of the time of the defendants' violative acts "there were in fact any requirements for sugar to be used 'for the defense of the United States'," as set forth in Section 2(a)(2) of Title III of the Second War Powers Act. (App. Br., p. 19.)

The pertinent part of Section 2(a)(2) read:

> "* * * Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense."

The facts which induced the President to exercise the power granted by this section were not required to be proved below. The law presumes that the decision by the President to act pursuant to that grant was preceded by adequate investigation and rooted in sufficient grounds. This principle is of long standing.

In 1827, the Supreme Court declared in *Martin v. Mott,* 12 Wheat. 19:

> "The argument is that the power confided to the President is a limited power, and can be exercised only in the cases pointed out in the statute, and therefore, it is necessary to aver the facts which bring the exercise within the purview of the statute. In short, the same principles are sought to be applied to the delegation and exercise of this power intrusted to the Executive of the nation for great political purposes, as might be applied to the humblest officer in the government, acting upon the most narrow and special authority. It is the opinion of the Court, that this objection cannot be maintained. When the President exercises an authority confided to him by law, the presumption is, that it is exercised in pursuance of law. *Every public officer is presumed to act in obedience to his duty, until the contrary is shown; and, a fortiori, this presumption ought to be favorably applied to the chief magistrate of the Union.* It is not necessary to aver, that the act which he may rightfully do, was so done." (Emphasis added.)

This presumption has been applied in other cases and in a great variety of circumstances. *Philadelphia & Trenton R. Co. v. Stimpson,* 14 Pet. 448, 458; *Rankin v. Hoyt,* 4 How. 327, 335; *Carpenter v. Rannels,* 19 Wall. 138, 146; *The Confiscation Cases,* 20 Wall. 92, 109; *Knox County v. Ninth National Bank,* 147 U.S. 91, 97; *Dakota Central Tel. Co. v. South Dakota,* 250 U. S. 163, 182, 184, 39 S. Ct. 507; *United States v. Chemical Foundation,* 272 U.S. 1, 14, 15,

47 S. Ct. 1, and reiterated in *Pacific States Box & Basket Co. v. White,* 296 U. S. 176, 56 S. Ct. 163, where Justice Brandeis stated:

> "The question of law may, of course, always be raised whether the Legislature had the power to delegate the authority exercised. Compare *Panama Refining Co. v. Ryan,* 293 U.S. 388, 55 S. Ct. 241, 79 L. Ed. 446, and *A. L. A. Schechter Poultry Corporation v. United States,* 295 U.S. 495, 55 S. Ct. 837, 79 L. Ed. 1570, 97 A.L.R. 947. But where the regulation is within the scope of authority legally delegated, the presumption of the existence of facts justifying its specific exercise attaches alike to statutes, to municipal ordinances, and to orders of administrative bodies."

Such a presumption can be challenged only if there should be no conceivable connection between the Congressional grant and the act performed under the delegated power. *Sterling v. Constantin,* 287 U. S. 378, 399, 400, 401. In this case, no challenge was made below by the appellants. Their argument here is based merely on their allegation that neither the President nor any administrative agency could possibly have made the finding that there were requirements for sugar to be used for the defense of the United States nearly a year after the cessation of active hostilities, because the term "defense" as used in Section 2(a)(2) of the Second War Powers Act "meant defense in the sense of defense against enemies". (App. Br., p. 20.)

No proof is offered to show that the word "defense" as used in the Act encompassed any other purpose

than that of vanquishing our enemies, nor do the appellants present any backing to their implication that with the end of active hostilities any rational nexus between the power granted the President and its exercise to allocate sugar, disappeared.

However, one need not go far to refute their statement. In House Report No. 1282, *supra,* Congress clearly expressed its intent that the term "defense" be not so narrowly limited. On page 4 appears the following explanation:

> "This title establishes the powers under which the War Production Board-Civilian Production Administration, Office of Price Administration, Department of Agriculture, Office of Defense Transportation, Solid Fuels Administration, and certain other agencies have allocated and rationed materials and facilities. The powers were used up to the capitulation of Japan for a twofold purpose—to assure simultaneously the production of a maximum quantity of war materials in a minimum of time, and of materials necessary to support the basic civilian economy. *Since that date there has been a change of emphasis in the exercise of these powers by the departments in the belief that Congress intended the defense program to include an orderly reconversion to a peacetime economy. During the next few months there will necessarily be a further change of emphasis in the exercise of these powers, with an increasing use for reconversion purposes as distinguished from the military purposes.* While both priorities and allocations will be granted where necessary to assure support of our Army and Navy, the primary task will be the liquidation

of our war effort and the hastening of reconversion and restoring the flow of materials to peacetime channels." (Emphasis added.)

It is noteworthy that each time Title III of the Second War Powers Act was subsequently extended, including the Sugar Control Extension Act of 1947, the words "for the defense of the United States" were advisedly retained therein by Congress. As expressed above, the defense of the United States will not be complete until an orderly reconversion to a peacetime economy is completed.

III.

APPELLANTS' CONTENTION THAT THERE WAS NO SUGAR SHORTAGE IN THE UNITED STATES AS OF JULY 1, 1946, AND THEREAFTER, IS TOTALLY WITHOUT MERIT.

Claiming that no sugar shortage existed in the United States as of July 1, 1946, or thereafter, appellants challenge the Third Revised Ration Order No. 3 as an unreasonable exercise of the rationing power. To support this contention, they offer statistics which appear on the face, to indicate that there was sufficient sugar available in the United States in 1946 to satisfy the requirements of the country for that year. (App. Br., p. 26.)

A summary glance over the figures, however, immediately reveals that their conclusion is based on a false premise—that the Cuban sugar allocated to other countries and the sugar exported in 1946 was

sugar taken from the United States supply and distributed to other countries. That was not the fact.

Appellants' chart shows that the difference between the 1946 requirements for sugar and the actual amount allocated for consumption in the United States for that year was 1,527,947 short tons, raw value. This difference between the demand and the supply of sugar in the United States during 1946 represents the actual shortage existent at that time.

There was no other sugar available to the United States that year. The Cuban sugar allocated to other countries is not "American sugar" as urged by the appellants. In purchasing the entire 1946 Cuban sugar crop, the United States bought it not only for itself, but on behalf of other nations. This clearly appears in the same report[5] from which the appellants took their figures concerning the "American sugar" which they claim was distributed to other foreign countries. Page 6 of the report states:

> "From 1946 production, Cuba reserved 398,000 tons for Island use and set aside 284,000 tons for free export, chiefly to Latin America. The remainder of the crop was sold to the United States, *which purchased both for itself and on behalf of other nations.* About 2,175,000 tons of 1946 Cuban output were scheduled for United States use. The remainder of the contract for the 1946 crop, including more than 1,600,000 tons, was

[5]Industry Report on Sugar, Molasses and Confectionery, Office of Domestic Commerce; Fats, Foods and Oils Section; Bureau of Foreign and Domestic Commerce, United States Department of Commerce, Dec., 1946.

allocated to the United Kingdom, Canada, and a number of sugar-short countries of continental Europe." (Emphasis added.)

Since 1942, the United States has acted as agent to buy the Cuban export supply for distribution among the importing countries, in accordance with the recommendations of the International Emergency Food Council.[6] The reason for the United States handling the sale of this Cuban sugar was explained as follows by James H. Marshall, Director, Sugar Branch, Production and Marketing Administration, United States Department of Agriculture:

> "In acting essentially as the sole purchaser of Cuban sugar, the United States has had to share some of the supply with other allied nations. This procedure has eliminated speculative bidding by the nations of the world and has also given Cuba an assured price without the inflationary and deflationary headaches which she suffered in 1919 and 1920. The first page of the 1946-47 Cuban sugar contract recognizes that one of the prime reasons for such a contract is that, 'al-

[6] "The International Emergency Food Council has no mandatory powers. It seeks to coordinate proposed distribution of exportable food supplies which are in short supply so that they may be used as effectively as possible in meeting pressing world food needs. Its recommendations are only effective upon acceptance by the member governments. The 30 nations which now comprise membership in the Council are as follows: Australia, Austria, Belgium, Brazil, Canada, Chile, China, Cuba, Czechoslovakia, Denmark, Egypt, Finland, France, Greece, India, Italy, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Republic of the Philippines, Siam, Sweden, Switzerland, Turkey, Union of South Africa, United Kingdom, and the United States"—House Report No. 150 to accompany H.J.Res. 146, 80th Cong., 1st Sess., dated March 15, 1947.

though hostilities have terminated, the effects of the war make it necessary during the reconversion period, because of the needs of the United States and other allied nations to undertake the supplying of sugar and other products through governmental agencies or organizations of an international character.'

Thus, there is an obligation on the part of the United States—acting as sole purchaser of nearly all of Cuba's sugar—to share a substantial part of this sugar, through sale to other nations. It is also an historical fact that many nations in addition to the United States purchased Cuban sugar in prewar years. It is reasonable to assume that Cuba is as anxious as any other nation to maintain her postwar trade with other countries of the world.'"[7]

In 1946, the Cuban sugar production totalled 4,476,000 tons. After allowances for Cuban local consumption and free export to other Latin American nations, Cuba had an exportable balance of 3,794,000 tons. Of that crop, the United States received for its own use 2,175,000 tons, which left a balance of 1,619,000 tons for Canada, the United Kingdom and other foreign countries.[8] Of this amount, 148,000 tons was UNRRA sugar. About one-fourth of the 1,619,000 tons sent to foreign nations has been refined in the United States.

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[7]Remarks before the annual convention of the American Bottlers of Carbonated Beverages, Miami, November 21, 1946.

[8]Industry Report on Sugar, Molasses and Confectionery, *supra*, p. 6.

This is the sugar that appellants have erroneously assumed was exported by the United States.[9]

It is often overlooked that in the true sense, the United States does not export sugar. We are a net importing nation of sugar and have been one for many years.[10] The Industry Report on sugar, molasses and confectionery, *supra,* page 10, on which appellants relied for their figures concerning Cuban sugar, shows clearly that of our 1946 supply of sugar, only about one-third was from domestic production and the balance had to be imported.

The exports shown in appellants' statistics are actually exports of Cuban sugar allocated to other countries, which was brought into the United States for the purpose of refining for the countries which have no facilities for the refining process. Thus, the figure of 312,511 tons which represented the difference between the 1946 and the 1935-39 "exports" was also erroneously designated as sugar which was removed from the 1946 available supply of sugar for the United States.

The sugar shortage in the United States in 1946, as at present, is so well-known as to be the proper subject of judicial notice. No juggling of figures can ob-

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[9]Remarks of James H. Marshall, Director, Sugar Branch, Production and Marketing Administration, United States Department of Agriculture, before the annual convention of the American Bottlers of Carbonated Beverages, Miami, November 21, 1946.

[10]See also, Message of the President of the United States transmitting request for the Extension of the Second War Powers Act after March 31, 1947, February 3, 1947. Document No. 80, 80th Cong., 1st Sess.

literate the cold fact that the devastation of war in important sugar producing areas resulted in a short world supply of sugar, from which the United States is not exempt.

In October, 1946, the United States Department of Agriculture issued this explanation:

"WHY SUGAR IS SHORT

Here are the major reasons why people in the United States aren't able to have approximately the 100 pounds of sugar per capita they want annually instead of the 73 pounds they're getting.

1. Present continental U. S. beet and cane sugar production is about 30 percent of the 1946 estimated distribution. This percentage was about the same in prewar years. During the war years, the pressures for other food crops brought about a substantial decline in domestic beet sugar production. This decline has now been checked, and substantial increases over the lowest production year are noted.

2. When the Japanese captured the Philippines, the U. S. lost about 1,000,000 tons of sugar which it annually imported from those Islands. War damage was so extensive that there will be no appreciable exports from the Philippines before 1948.

3. Jap occupation of Java eliminated about 1,250,000 tons of sugar which normally went to countries friendly to the United States. This placed an additional 'squeeze' on world supplies. Java will probably not produce again for export before 1948.

4. Nearly all European countries produced substantial amounts of beet sugar in prewar years, but this industry was badly torn apart by war and Nazi occupation. European beet sugar production is making a steady though gradual comeback.

5. Many factors, including usable land areas, make it impracticable to increase substantially the cane sugar production in Louisiana, Florida, Puerto Rico, Hawaii, or the Virgin Islands.

6. Cuba—and to a lesser extent, other Caribbean areas, became the 'world sugar bowl.' Although Cuba increased production substantially, she could not offset losses suffered in all other parts of the world.

Only in 1943 could Cuba have produced a little more sugar, but at that time submarine sinkings were so bad and shipping was so restricted that additional sugar could not have been moved from Cuba even if produced—and Cuba used all possible storage space. Some sugar was, in effect, 'stored in the field' by letting substantial acreages of cane grow for 2 years instead of 1. Two-year cane produces more sugar than 1-year cane—but not as much as two crops of 1-year cane.

As a war measure, the equivalent of about 900,000 tons of the '44 crop Cuban sugar was diverted to manufacturing industrial alcohol required for making synthetic rubber.

In 1945 Cuba suffered the worst drought in 87 years, with a consequent loss of about 900,000 tons of sugar production.

7. All these (and others) factors have aggravated the shortage. U. S. citizens would have

had a little bit more sugar if this nation had flatly refused to share any supplies with our allies, or had refused to extend a minimum of aid to liberated areas."

The importance of rationing sugar in the United States was stressed by the President in his Message to Congress on February 3, 1947, concerning the extension of the Second War Powers Act after March 31, 1947, when he stated:

"Because of our heavy dependence on imports, the world shortage of sugar and related products is of outstanding concern to the United States. Total sugar available for shipment to the United States, Canada, and all western European countries in 1947 is expected to be only about 7½ million tons, compared with average net imports before the war of about 8½ million and 1946 imports of 6¾ million * * *

In this situation, both our domestic and international interests require continuation of domestic and import controls over sugar and edible molasses and syrups and import controls only over other sugar-containing products and inedible molasses.

Domestically, unless current controls are continued, there would be inequitable distribution of the limited supply among various users; much sugar would be held for speculative purposes, and it is probable that sugar would go to a greater extent to industrial users, resulting in a lower proportion for household consumers than they now receive * * *

> Internationally, decontrol would make it extremely difficult for us to carry out the understanding under which the United States, since 1942, has acted as agent to buy the Cuban export supply for distribution among the importing countries in accordance with the recommendations of the International Emergency Food Council * * *."

In the face of such well known facts, appellants' argument that there was no sugar shortage in the United States loses all vestige of merit.

IV.

APPELLANTS CANNOT PROPERLY RAISE THE QUESTION OF THE CONFLICT OF THE HISTORICAL USE METHOD OF ALLOCATING SUGAR TO INDUSTRIAL USERS WITH THE PROVISIONS OF THE WAR MOBILIZATION AND RECONVERSION ACT.

Appellants admit that the record discloses only that they were wholesalers and contains no indication that they were industrial users at the time of the proceedings below. Nevertheless, they aver that as "wholesalers" they were subject to the provisions of the Third Revised Ration Order No. 3 as "industrial users." They then attack the validity of the Third Revised Ration Order No. 3 on the ground that the historical use method of allocating sugar to industrial users conflicts with the provisions of the War Mobilization and Reconversion Act. (App. Br., p. 21.)

Appellee submits that appellants' argument falls for these reasons:

a. Appellants' status in the action below was that of a wholesaler and not an industrial user. (See Complaint, R. 3; Affidavit in support of Temporary Restraining Order, R. 9; Ration Bank Statement, R. 13; Findings of Fact, R. 18, where the Court found that the allowable inventory of the Company was 36,627 pounds.)[11] There is nothing to indicate that the appellants were industrial users. Nor does the record contain a showing of any relationship whatsoever between the violation charged below and the amount of sugar which would have been allowable to the appellants, assuming that they were industrial users and what adverse effect, if any, the historical use method of sugar allocation would have had on their business.

Third Revised Ration Order No. 3[12] clearly shows that wholesalers and industrial users are considered as separate and distinct classes and are subject to different provisions therein.

Section 25.1(c)(3) defines "industrial user" as "any 'person' who has an industrial user establishment. 'Industrial user establishment' means any establishment where a person uses sugar in producing, manufacturing, or processing any product other than sugar if the product is not to be used in the preparation or service of food or beverages which the establishment or its owner serves to consumers

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[11]Section 4.3 of the Order provides for a working inventory of sugar for each registered wholesaler. This is known as an "allowable inventory." No other class of users is given this type of allowance.

[12]11 F.R. 177.

* * * An industrial user who ceases (other than temporarily) to make an industrial use of sugar is not regarded as an industrial user after he ceases."

Section 25.1(c)(29) defines "wholesaler" as "an establishment which makes over 50 percent of its sales of all merchandise to persons other than consumers. The term 'wholesaler' does not include a primary distributor."

Article II, Sections 2.1 to 2.14 contain provisions for registration, allotments, ration banking, etc. of industrial users while rules for the registration, allowable inventories, ration banking, etc. of wholesalers are contained in Article IV, Sections 4.1 to 4.9. There is nothing in the entire regulation which applies to one class of users the provisions exclusively applicable to another. Thus, appellants erroneously stated in their brief that as wholesalers they "were subject as industrial users to the provisions of Third Revised Ration Order No. 3."

b. The decision in *Moberly Milk Products Co. v. Fleming* (App. D. C., Feb. 14, 1947, not yet reported; Petition for Writ of Certiorari pending), on which the appellants rely in their argument was limited only to the effect of Amendment 24 of Third Revised Ration Order No. 3 on the bulk sweetened condensed milk manufacturers. It did not include the effect of Section 2.1(2) on the industrial users generally. Moreover, the Court's holding there did not invalidate Third Revised Ration Order No. 3. On the contrary, the Court took pains to point that out as follows:

"We note at this point that the injunction order of the District Court is not a sweeping invalidation of rationing or allotments. It is couched in the language of the statute. It enjoins appellants only from carrying out such provisions as make the quota dependent upon the existence of any concern or the functioning of any concern in the bulk sweetened condensed milk manufacturing industry at any given time, or contain restrictions which prevent any small plant, capable and desirous of participating in the expansion, resumption, or initiation of production of bulk sweetened condensed milk from so participating in such production. Those are the terms of the prohibition of the statute. The injunction of the court merely places upon the injunction of the Congress the enforcing power of the judiciary. It directs the Administrator not to do what Congress directed him not to do."

c. Furthermore, any question of conflict of the provisions of Section 2.1(e) and 2.1(2) of the Third Revised Ration Order No. 3 with the War Mobilization and Reconversion Act has been rendered moot by the following provision of the Sugar Control Extension Act of 1947 (Public Law 30, 80th Congress, 1st Session):

"Sec. 1(b). The Secretary of Agriculture, in exercising the powers, functions, and duties transferred to him by section 3 of this Act (1) may allocate sugar without regard to the provisions of Title II of the War Mobilization and Reconversion Act of 1944 (58 Stat. 787); * * *."

It is well-settled that if after judgment and before the decision of the Appellate Court a law intervenes and changes the governing rule, the Appellate Court will give such law effect. *United States v. The Schooner Peggy,* 1 Cranch 103, 2 L. Ed. 49; *Carpenter v. Wabash Railway Co.,* 60 S. Ct. 416, 309 U. S. 23, rehearing denied 60 S. Ct. 585; *Vanderbark v. Owens-Illinois Glass Co.,* 311 U. S. 538, 61 S. Ct. 347; *Hines v. Davidowitz,* 312 U. S. 52, 61 S. Ct. 399; *Public Utilities Comm. of Ohio v. United Fuel Gas Co.,* 63 S. Ct. 369, 317 U. S. 456, rehearing denied 63 S. Ct. 557; *Ziffrin, Inc. v. United States,* 63 S. Ct. 465, 318 U. S. 73, rehearing denied 63 S. Ct. 757, 318 U. S. 800; *Standard Oil Company v. Angle,* 128 F. (2d) 728 (C. C. A. 5th, 1942).

The principle has also been applied by this Court in *Home Savings & Loan Association v. Plass,* 57 F. (2d) 117, where it was held that where during appeal Congress passed an act excluding building and loan associations from the operation of the Bankruptcy Act, an appeal from the dismissal of appellant's petition below, had to be dismissed because of lack of jurisdiction.

Therefore, even if the issue of conflict with the War Mobilization and War Reconversion Act were properly present here, the application of the above-quoted provision in the Sugar Extension Act of 1947 by the Court would dispose of the question.

V.

VIOLATIONS OF THE SECOND WAR POWERS ACT WERE NOT AFFECTED BY THE SUSPENSION OF THE OPERATION OF THE EMERGENCY PRICE CONTROL ACT OF 1942, FROM JULY 1 TO 25, 1946.

It is urged that the "period of refuge" during which price control was suspended, July 1 to July 25, 1946, should be made "available to appellants in this case to the same extent as if this were a price control case." (App. Br., p. 32.)

Needless to say, the contention is incongruous. The action below was brought under the authority of the Second War Powers Act for a violation of Third Revised Ration Order No. 3 promulgated thereunder. The functions of the Second War Powers Act, as amended,[13] and of the Emergency Price Control Act of 1942, as amended,[14] are entirely separate and distinct. Any violations, therefore, of the Second War Powers Act and regulations issued thereunder during the period the appellants depend upon were, of course, not affected by the suspension of the Emergency Price Control Act.

The hiatus period, July 1 to July 25, 1946, when the operation of the Emergency Price Control Act was deferred, did not affect the functions, powers and duties of the Office of Price Administration and the Price Administrator with respect to allocation and rationing, which were vested in the President by Title

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[13] 56 Stat. 176, 50 U.S.C. App. Secs. 631-645(a).
[14] 56 Stat. 23, 50 U.S.C. App. Secs. 901-946.

III of the Second War Powers Act and delegated thereunder to the Office of Price Administration and the Price Administrator.

Moreover, even though the Emergency Price Control Act was not extended until July 25, 1946, all the functions of the Office of Price Administration with respect to the Emergency Price Control Act of 1942, did not terminate on June 30, 1946. Certain provisions of the Act remained in force during the hiatus period. Section 1(b) of the Emergency Price Control Act provided:

> "The provisions of this Act, and all regulations, orders, price schedules, and requirements thereunder, shall terminate on *June 30, 1946,* * * * except that as to offenses committed, or rights or liabilities incurred, prior to such termination date, the provisions of this Act and such regulations, orders, price schedules, and requirements shall be treated as still remaining in force for the purpose of sustaining any proper suit, action, or prosecution with respect to any such right, liability, or offense."

This was affirmed by the President in Executive Order 9745 (11 F. R. 7327), dated June 30, 1946, in which the Office of Price Administration and the Price Administrator were directed to continue to exercise their continuing functions under the Emergency Price Control Act as well as the Second War Powers Act.

VI.

THE DISTRICT COURT DID NOT ERR IN ISSUING THE TEMPORARY INJUNCTION.

Appellants urge that in issuing the temporary injunction, the Court erred on two grounds: (1) that there were no allegations of facts in the Administrator's complaint or affidavit to show that defendants threatened to continue drawing invalid ration bank checks; and (2) that the Court's findings of fact that defendants threatened to continue issuing such invalid bank checks, were "merely conclusions" without sufficient basis in fact. (App. Br., p. 36.) Neither argument is tenable.

1. It is well-settled that in an application for a statutory injunction, no showing of irreparable injury need be made. The right of the United States or any agency thereof to obtain an injunction provided for by statute stands upon a different footing than a private party's right to an injunction. The distinction stems from the fact that instead of being a procedural mechanism for protection of private rights, the statutory injunction is a tool for the effectuation of Congressional policy and the vindication of public rights. Thus, the traditional equity concepts of the occasions for the issuance of injunctions do not apply[15] and need for granting statutory injunctive relief is measured

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[15]It may be noted that Congress has, where it wanted the usual equity principles to apply, made express provision therefor. See 38 Stat. 737 (1914), 15 U.S.C.A. Sec. 26 (1941), providing injunctions "when and under the same conditions and principles as injunctive relief * * * is granted by courts of equity, under the rules governing such proceedings * * *." See also 29 Stat. 694 (1897) as amended, 42 Stat. 392 (1922), 35 U.S.C.A., Sec. 70 (1940).

by standards of public interest rather than requirements of private litigation.

In a case decided by this Court, *American Fruit Growers v. United States,* 105 F. (2d) 722, 725 (C. C. A. 9th, 1939), a statute similar to Section 2(a)(6) of the Second War Powers Act was involved, in that the provisions for injunction were phrased in terms of grants of jurisdiction. There, the Court stated:

> "Appellant contends that the allegations of irreparable injury to the United States are conclusions of law, and that no facts are pleaded which show irreparable injury or that the United States has no adequate remedy at law. We think allegations of such facts were unnecessary, because of 7 U.S.C.A. § 608a(6). Congress apparently concluded that a violation of a valid order would cause irreparable restriction on shipments in that the theory expressed by the act required restriction on shipments and unless the fixed restrictions were complied with, the Act would serve no purpose. By 7 U.S.C.A. § 608a(6) Congress authorized an injunction upon a showing of violation alone."

The principle was again reiterated by this Court in *Bowles v. Huff,* 146 F. (2d) 428, 430 (C.C.A. 9th, 1944); see also, *United States v. Adler's Creamery, Inc.,* 110 F. (2d) 482 (C. C. A. 2d), certiorari denied 311 U. S. 657 (1940); *Fleming v. Salem Box Co.,* 38 F. Supp. 997 (D. Ore., 1940); *Fleming v. Whittemore,* 41 F. Supp. 767 (D. Ky., 1941.)

2. Appellants do not actually show wherein the Court's finding, that there was a threat of future

violations, was erroneous. The findings concerning the danger of violations in the future read as follows:

> "7. Unless restrained and enjoined defendants and each of them threaten to and will continue to issue sugar ration bank checks without having in their ration bank account a balance sufficient to cover the amount of such checks.
>
> 8. Unless restrained and enjoined defendants and each of them threaten to and will use and dispose of and put beyond their possession and [17] control sugar obtained by means of invalid sugar ration bank checks.
>
> 9. Unless defendants and each of them are restrained and enjoined from issuing further sugar ration bank checks and from overdrawing their ration bank account or from using or permitting the use of or otherwise disposing of the sugar now subject to their order and control or in their possession, the general public will be denied its right to a proper allotment and proportion of the sugar available for general public consumption.
>
> 10. Unless defendants are restrained and enjoined, further violations of Third Revised Ration Order No. 3, as amended, are likely to occur and the sugar in the possession of the defendants and each of them is likely to be disposed of before a hearing can be had and the action herein tried upon its merits and a permanent injunction issued thereon or before the Administrator of the Office of Price Administration can take final and effective administrative action to preserve or equitably distribute or dispose of such sugar." (R. 19-20.)

These findings, the appellants claim, were erroneous because no inference could have been drawn by the Court that they would violate in the future, as the acts on which the findings were based had been committed during the time between the expiration date of the Emergency Price Control Act of 1942, June 30, 1946 and the date of its extension, July 25, 1946; and that there was nothing in the complaint or affidavits to show that any violative act occurred after that period.

As shown before, this action was brought under the provisions of the Second War Powers Act, in full force and effect during the hiatus period of the Emergency Price Control Act of 1942. The interval, therefore, on which appellants rely to absolve their violative overdrafts had no effect upon the legality of their acts under the Second War Powers Act. However, even if it were assumed, for purpose of argument, that the provisions of the Third Revised Ration Order No. 3 were inoperative during the hiatus period, the record nevertheless shows that they had violated its provisions subsequent to July 25, 1946.

The Complaint (R. 4) alleged that the acts complained of occurred between July 11, 1946 and August 7, 1946. A certified copy of appellants' Ration Bank Statement with the Union Bank and Trust Company was attached to the affidavit in support of Temporary Restraining Order and Order to Show Cause for Preliminary Injunction. This bank statement clearly shows that on August 1, 1946, well after the termination of the hiatus period, appellants had drawn three

checks totalling 770,000 pounds at a time when their account was already overdrawn by 576,804 pounds of sugar. (R. 13.)

The record contains nothing to support appellants' statement that no reasonable inference could have been drawn by the Court from the facts alleged in the complaint or affidavits, that they would continue to issue invalid sugar ration bank checks in the future. They admit in their brief (p. 35) that they secured large amounts of sugar during the period of July 11 to August 7, 1946, by issuing invalid ration checks. They urge, however, that the Court should have drawn the inference that having so fully supplied themselves, they would no longer do wrong.

This Court has repeatedly affirmed the long-followed principle that the District Court, being in the best position to judge the evidence and testimony in the proceedings below, its findings will not be disturbed by the Appellate Court unless "clearly erroneous." Federal Rules of Civil Procedure, Rule 52(a), 28 U. S. C. A. following Section 723(c); *Augustine v. Bowles,* 149 F. (2d) 93 (C. C. A. 9th, 1945); *Hartford Accident & Indemnity Co. v. Jasper,* 144 F. (2d) 266 (C. C. A. 9th, 1944); *United States v. Cushman,* 136 F. (2d) 815 (C. C. A. 9th, 1943), certiorari denied 64 S. Ct. 194, 320 U. S. 786; *O'Keith v. Johnston,* 129 F. (2d) 889 (C. C. A. 9th, 1942), certiorari denied 63 S. Ct. 256, 317 U. S. 711; *Kelly v. Johnston,* 128 F. (2d) 793 (C. C. A. 9th, 1942), certiorari denied 63 S. Ct. 558, 318 U. S. 798.

Needless to say, appellants' naive argument, that having gorged themselves before the action was

brought it should have been inferred that they would not violate again, is not sufficient to show that the findings of the Court were clearly erroneous.

An application for an interlocutory injunction is addressed to the sound discretion of the trial Court and such an order, either granting or denying such injunction, will not be disturbed by an Appellate Court unless the discretion was improvidently exercised. *Alabama v. United States,* 279 U. S. 231, 49 S. Ct. 266; *Wilson & Co., Inc. v. Best Foods, Inc.,* 300 Fed. 484 (C. C. A. 9th); *Somner v. Rotary Lift Co.,* 66 F. (2d) 809 (C.C.A. 9th). This Court has held that "discretion" is abused "when the judicial action is arbitrary, fanciful or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial Court. If reasonable men could differ as to the propriety of the action taken by the trial Court, then it cannot be said that the trial Court abused its discretion." *Delno v. Market St. Railway Co., et al.,* 124 F. (2d) 965 (C.C.A. 9th, 1942).

The record shows, and the appellants do not deny, that they had overdrawn their ration bank account to the amount of 1,370,000 pounds of sugar by issuing invalid ration checks. It is easily understood that unless immediately enjoined, there was danger that appellants would dispose of the sugar they obtained through the issuance of these checks before a hearing could be had, thereby denying the general public of its right to a proper allotment and proportion of the sugar available for general public consumption. Unless enjoined, there was also a threat that the appellants

would continue to issue additional sugar ration bank checks without having in their ration bank account a balance sufficient to cover the amount of such checks. There is nothing in the record to contradict the Court's conclusion. In this case, no reasonable man could even differ as to the propriety of the action taken by the trial Court below.

CONCLUSION.

It respectfully submitted that the contentions of the appellants are plainly without merit, and that the order appealed from should be affirmed.

Dated, April 25, 1947.

Respectfully submitted,

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